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Supreme Court U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, et al.,

Appellants,

v.

BEVERLY MORRIS, et al.,

Appellees.

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On Appeal from the United States Court of Appeals for the Second Circuit

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# APPENDIX TO JURISDICTIONAL STATEMENT
TWO VOLUMES
VOLUME I PP. 1-118

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PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Municipal Appellants,
100 Church Street,
New York, New York 10007
(212) 566-4338

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
FAY LEOUSSIS,
of Counsel

-and-

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
Special Assistant Corporation Counsel
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

SIMON H. RIFKIND
EDWARD N. COSTIKYAN,
GERARD E. HARPER,
of Counsel.

STRANIERE & STRANIERE
Attorneys for Appellant Straniere
88 New Dorp Plaza
Staten Island, New York, 10306
(718) 667-9111

RAYMOND A. FASANO,
of Counsel.

*Counsel of Record.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant-Appellant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

Court Of Appeals
Docket Nos. 86-9019, 9041 and 9059

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

**NOTICE IS HEREBY GIVEN** that the Board of Estimate, the City of New York,

Edward I. Koch, Harrison J. Goldin, Howard Golden, David N. Dinkins, Fernando Ferrer, Clare Shulman and Ralph J. Lamberti, the defendants-appellants above-named, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Second Circuit, entered October 8, 1987, which affirmed the judgment of the United States District Court for the Eastern District of New York entered November 19, 1986 holding that sections 61 and 62 of the New York City Charter violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 USC § 1254(2).

Dated: New York, New York
October 15, 1987

PETER L. ZIMROTH,
Corporation Counsel for the
City of New York,
Counsel for Defendants-
Appellants,
100 Church Street,
New York, New York 10007.
(212) 566-4338
By: LEONARD KOERNER,
of Counsel.

TO: ELAINE GOLDSMITH, Clerk,
United States Court of Appeals
for the Second Circuit,
United States Courthouse,
Foley Square,
New York, New York 10007.

RICHARD EMERY,
ARTHUR EISENBERG,
Attorneys for Plaintiffs-Appellees,
New York Civil Liberties Union,
132 West 43rd Street,
New York, New York 10036.
(212) 944-9800

FRANK V. PONTERIO,
Intervenor-Defendant-Appellant,
Pro Se,
766 Pelton Avenue,
Staten Island, New York 10310
(718) 981-7953

STRANIERE & STRANIERE,
Attorneys for Intervenor-Defendant-
Appellant Straniere,
88 New Dorp Plaza,
Staten Island, New York 10306.
(718) 667-9111

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant-Appellant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

Court Of Appeals
Docket Nos. 86-9019, 9041 and 9059

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

NOTICE IS HERBY GIVEN that ROBERT A. STRANIERE, one of the Intervenor-

Defendant-Appellants above-named, does hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Second Circuit, entered on October 8, 1987, which affirmed the judgment of the United States District Court for the Eastern District of New York entered November 19, 1986, holding that sections 61 and 62 of the New York City Charter violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 USC Sec. 1254(2).

Dated: New York, New York
November 6, 1987

STRANIERE & STRANIERE
Attorneys for Intervenor-
Defendant-Appellant Straniere
88 New Dorp Plaza
Staten Island, New York 10306
(718) 667-9111
By: RAYMOND A. FASANO,
of Counsel.

TO: ELAINE GOLDSMITH, Clerk,
United States Court of Appeals
for the Second Circuit,
United States Courthouse,
Foley Square,
New York, New York 10007.

RICHARD EMERY,
ARTHUR EISENBERG,
Attorneys for Plaintiffs-Appellees,
New York Civil Liberties Union,
132 West 43rd Street,
New York, New York 10036.
(212) 944-9800

PETER L. ZIMROTH,
Corporation Counsel
Counsel for Defendants-Appellants
100 Church Street
New York, New York 10007
(212) 566-4338

BARBARA PONTERIO,
Attorney for Intervenor-Defendant-
Appellant, Pontiero,
766 Pelton Avenue,
Staten Island, New York 10310
(718) 981-7953

DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED OCTOBER 8, 1987
DOCKET NOS. 86-9019, 9041, 9059

---

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant-Appellant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

---

Before OAKES, NEWMAN, and PIERCE, Circuit Judges.

Appeal by the New York City Board of Estimate and individual members thereof, as well as two intervenors, from a decision of the United States District Court for the

Eastern District of New York, Edward R. Neaher, Judge, on remand, holding that the fact that three members of the Board were elected citywide did not affect the 132.9% unconstitutional deviation under Abate v. Mundt existing between largest and smallest boroughs. Morris v. Board of Estimate, 592 F. Supp. 1462 (E.D.N.Y. 1984). Affirmed.

Newman, Circuit Judge, filed a concurring opinion.

Leonard Koerner (Peter L. Zimroth, Corporation Counsel of the City of New York, Stephen J. McGrath, Fay Leoussis, of counsel), Edward N. Costikyan (Simon H. Rifkind, Gerard E. Harper, Paul, Weiss, Rifkind, Wharton & Garrison, Special Assistant Corporation Counsel), for Appellant Board of Estimate.

Barbara Ponterio, Staten Island, NY, for Intervenor-Appellant Ponterio.

Robert A. Straniere, Staten Island, NY, Appellant Pro Se.

Richard Emery, New York Civil Liberties Union, New York, NY (Arthur Eisenberg, New York Civil Liberties Union, of counsel), for Appellees.
John J. Marchi, Amicus Curiae Pro Se.

Michael Weinberger, New York, NY for Amicus Curiae Staten Island League for Better Government.

OAKES, Circuit Judge:

The Board of Estimate is a body of New York City municipal government authorized by chapter 3 of the New York city charter. It is comprised of the mayor, city council president, comptroller, and the five borough presidents of the City of New York, which is to a substantial extent governed by the Board of Estimate. The three citywide officials on the Board are granted two votes each as to non-budgetary matters, while each borough president is granted one vote. As to budget matters, the mayor has no vote but does have a veto power. The Board of Estimate is the only municipal body in New York City government which requires the

mayor, the comptroller, the city council president, and the borough presidents to meet regularly and vote together upon issues concerning the governing of New York City. It exclusively determines the use, development, and improvement of city property; approves the standards, magnitude, and final design of capital projects; negotiates and enters into all contracts on behalf of the city; negotiates and approves all franchises granted by the city; grants leases of city property and enters into leases of property for city use; sets water rates and sewer rates in the city; approves or modifies all zoning decisions; and sets tax abatements. The Board's enormous exclusive powers may be illustrated by saying that it alone may determine whether and where a toxic waste dump can be located in the city, as we explore later in this opinion.

Besides the Board's exclusive powers, it has powers acting in conjunction with the New York City Council to recommend and approve the expense budget and the capital budget of the city (without the participation of the mayor), periodically to modify the budgets of the city, to override mayoral vetos of budget items, and to hold hearings on budgetary matters. The Board of Estimate also administers the Bureaus of Franchises and of the Secretary, holds public hearings on matters of city policy when called upon to do so by the mayor or in its discretion for the public interest, holds hearings on tax abatements, and makes recommendations to the mayor or City Council in regard to any matter of city policy. The parties stipulated that the population of the City of New York is 7,071,030, and that the population of Brooklyn is 2,230,936, Queens 1,891,325,

Manhattan 1,427,533, the Bronx, 1,169,115, and Staten Island, 352,121.

Having determined that the Board of Estimate is subject to the "one-person, one-vote" principle, we remanded this case when it first came before us with instructions that the district court begin its task by deciding on an appropriate methodology for determining the degree of malapportionment present. Morris v. Board of Estimate, 707 F.2d 686, 690-91 (2d Cir. 1983). In a footnote our opinion noted, "For example, the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." Id. at 690 n.3. The district court, following the principle articulated in Abate v. Mundt, 403 U.S. 182,

185 (1971), that "electoral apportionment must be based on the general principle of population equality and [that] this [principle] applies to ... local elections," Morris v. Board of Estimate, 592 F. Supp. 1462, 1466 (E.D.N.Y. 1984), determined the maximum deviation from equality, or "overall range,"[1] by taking the sum of the deviation from ideal district population of the most and least populous boroughs. The court refused to modify the Abate methodology by virtue of the presence on the Board of three officials elected at-large, and focused only on the five borough presidents. Measuring from an ideal district population of 1,414,206, the court calculated the deviation from equality thus:

| Borough | Population | Deviation |
|---|---|---|
| Brooklyn | 2,230,936 | - 57.7% |
| Queens | 1,891,325 | - 33.7% |
| Manhattan | 1,427,533 | - 0.9% |
| Bronx | 1,169,115 | + 17.4% |
| Staten Island | 352,121 | + 75.2% |

Adding the 57.7% deviation of Brooklyn as the most underrepresented borough to the 75.2% deviation of Staten Island as the most overrepresented borough, the court arrived at a maximum deviation or range of 132.9% Id. at 1475.

We commence by noting that the district court did not violate what we read as the mandate of this court in declining to consider citywide board members in determining the constitutionality of the present Board. In the first place, what we said earlier was simply that the district court should address the question whether the presence of the three members of the Board who are elected at large from the entire city should make a difference in

respect to methodology. The district court did address that question at considerable length and answered it in the negative. The court did so for three reasons which, though briefly summarized here, will be more fully discussed below. The district court argued convenience, mentioning the "demonstrated impatience with mathematical metaphysics" in Mahan v. Howell, 410 U.S. 315, 319, n.6, modified on reh'g, 411 U.S. 922 (1973); principle, in that that at-large members represent voters as city residents, giving every voter an equal say in their election, while the borough presidents represent voters in their capacities as residents of a particular borough; and precedent. See 592 F. Supp. at 1466, 1470-75. We turn then to the issues argued on this appeal.

Though two issues concerning the district court's methodology are closely related, for the sake of clarity we will

distinguish them. The first and more basic issue is whether the court correctly adopted the Abate test, which looks only to the relative power of voters to elect representatives, and therefore focuses almost entirely on the simple question of population per representative. The Board strenuously urges that the court should instead have applied the Banzhaf index, to measure the power of voters in the various boroughs to affect the outcome of a Board vote.[2] The second issue is whether the court should have included the at-large representatives on the Board in any calculation of voting inequality. Use of the Banzhaf index would require inclusion of the at-large representatives, since the outcome of a Board vote will often turn on how one of the at-large members casts his vote.[3] Using the Abate method, however, leaves whether to modify the test so as to include the at-large

representatives in calculations of voter inequality as a distinct issue.

Turning first to the more basic of the methodological issues raised here, we hold that the district court properly adopted the Abate theory that what the equal protection clause requires be equalized among voters is their "share" of representatives on the governmental body in question. In the simplest of cases, where each representative has an equal vote (i.e., there is no weighted voting), Abate requires only that the court look to the number of citizens in each representative's district; equality is achieved where those numbers are equal.

The Abate, analysis, with its focus on a citizen's power to elect representatives, has its provenance in Reynolds v. Sims, 377 U.S. 533 (1964), which of course concerned a state legislature. There, after noting that "[m]ost citizens can achieve ... [[f]ull and

effective participation ... in state government] only through the election of legislators to represent them," id. at 565, the Court held that what "the Equal Protection Clause guarantees" is "the opportunity for equal participation by all voters in the election of state legislators", id. at 566, and that this required that seats in the legislature be apportioned on the basis of population, id. at 568.

This approach has been pervasive in the Supreme Court's jurisprudence of voter equality even when applied to local governmental bodies. In Avery v. Midland County, 390 U.S. 474 (1968), the Court applied the Reynolds one-person, one-vote principle to the Midland County, Texas, Commissioners Court, the county's governing board, which consisted of one member elected at large and four members elected from single-member districts of substantially

unequal population. Ignoring the presence of the member elected at large, the Court held the Midland County arrangement unconstitutional and stated "that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." Id. at 485-86. As in Reynolds, the Court made clear precisely what the equal protection clause requires be equalized. It requires "that those qualified to vote have the right to an equally effective voice in the election process." Id. at 480 (emphasis added). See also Hadley v. Junior College District, 397 U.S. 50, 56 (1970) ("whenever a ... local government decides to select persons by popular election to perform governmental functions, ... each

qualified voter must be given an equal opportunity to participate in that election," to be achieved by establishing districts so "that equal numbers of voters can vote for proportionally equal numbers of officials") (emphasis added).

It is true that in cases involving only single member districts there is no difference between approaches seeking to equalize the power of a voter to affect the outcome of a decision and those seeking only to equalize participation in the election process.[4] Thus it an be argued that the language in Reynolds, Hadley, and Abate to the effect that it is the power of citizens to elect representatives that must be equalized is not clear authority against requiring equality of power over outcome in a case involving more complex arrangements than single-member districts. Avery nevertheless strongly suggests that the Supreme Court indeed

intends equality of electoral power to be the controlling principle in voting cases. As noted above, the governmental body in Avery consisted of four officials elected from single-member districts and one official elected at large. If the equal protection clause requires that persons have an equal ability to affect the outcome of a governing body's votes, the Court in Avery might have been expected to factor in the single at-large member, who voted when the other members' votes were tied. Such an analysis would take account of each voter's power to cast the decisive vote for the at-large member, and that member's power to cast the decisive vote when the Commissioners Court reached a decision. See note 2, supra. But, in fact, the Court did not analyze the effect on voting power of the presence of the at-large member, focusing instead entirely on the population disparity among

the districts electing the other four members. A court that looks only to voters' relative power to elect representatives for single-member districts, where the scheme also includes at-large members, is obviously not thinking of equality in terms of power over the outcome of voters in the governing body. See also Markoe v. Legislature of Virgin Islands, 592 F.2d 188, 190-91 (3d Cir. 1979) (determining equality of representation in electing a fifteen-member body without reference to the one at-large representative); Perry v. City of Opelousas, 515 F.2d 639, 641-42 (5th Cir. 1975) (maximum deviation in case involving five single-member and one at-large district calculated solely by reference to the single-member districts); Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012, 1015 (D. Mass.), stay denied, 716 F.2d 68 (1st Cir.), stay denied,

463 U.S. 1319 (1983) (Brennan, J., in chambers) (nine district and four at-large members; maximum deviation calculated by reference only to the nine district members); Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975) (Newman, J.) (town council of ten single-member and one at-large districts; no reference to at-large member). The clear lesson of Avery and the other cases cited is that the proper inquiry in cases such as this is into the relative power of voters to elect representatives.[5]

We find further support for our conclusion in the Supreme Court's decision in Whitcomb v. Chavis, 403 U.S. 124 (1971). In that case a citizen of Lake County, Indiana, challenged the state's arrangement of multimember electoral districts for the state general assembly, claiming that "Marion County was one-third larger in population and ... had approximately one-third more

assembly seats than Lake County, but that voter influence does not vary inversely with population and that permitting Marion County voters to elect 23 assemblymen at large gave them a disproportionate advantage over voters in Lake County." Id. at 129 (footnote omitted). The citizen-plaintiff claimed that "Marion County voters had greater opportunity to cast tiebreaking or 'critical' votes." Id. at 137. Other plaintiffs argued that multimember Indiana districts gave disproportionate advantage to voters in those districts over voters in single-member Indiana districts, on the ground that the voter represented by multiple representatives had a disproportionate opportunity to influence the outcome of votes in the general assembly. Id. at 144. These, of course, are claims based on the Banzhaf voting-power method of measuring voter equality. See id. at

145-46. n.23. The Court stated that it had no quarrel with the plaintiffs' mathematical demonstration "that in theory voting power does not vary inversely with the size of the district and that to increase legislative seats in proportion to increased population gives undue voting power to the voter in the multi-member district since he has more chances to determine election outcomes than does the voter in the single member district." Id. at 144-45. Nevertheless, the Court refused to adopt the Banzhaf analysis, because "the position remains a theoretical one," id. at 145, and was unrealistic in not taking into account "any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." Id. at 146.

We are similarly persuaded that the Banzhaf index is an insufficiently realistic measure of voter equality to provide the basis of a Fourteenth Amendment analysis of voter equality. It is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate. As a result, the Banzhaf index does not sufficiently reflect " "t]he real life impact of [the makeup of the Board of Estimate and the way its members are elected] on individual voting power ... to warrant departure from prior cases." Id.

As a general matter, a core claim of the Banzhaf analysis, that the ability of a voter to cast a decisive vote in an election is the proper test of voting power, is unrealistic. As one commentator has written,

> [u]ndoubtedly, the chance to break a tie is not a significant voting motivation. In terms of utility theory, a voter would sell

> that right for very little, whereas he would charge much more to give up his right to vote altogether. The chance to break a tie thus constitutes only a small part of the value of voting, and it is not clear that this chance fairly represents the comparative value of voting in [different] districts.

Mr. Finkelstein, Quantitative Methods in Law 112 (1978). See also Rae, Reapportionment and Political Democracy, in Reapportionment in the 1970's, at 95, 95 (N. Polsby ed. 1971) ("the most rigorous analysis of the value assignable to a single vote leads its authors to emphasize considerations having nothing to do with outcomes ... One votes because he thinks it his duty as a citizen or because he feels social pressure to do so or because he finds a symbol of inclusion in the act. All this is independent of the political consequences of voting ...." (emphasis in original; foootnote omitted)), citing Riker and Ordeshook, A Theory of the Calculus of Voting, 62 Am. Pol. Sci. Rev. 25 (1968).

Even assuming that a desired outcome is a significant motivating factor for voters, the Banzhafian calculation of the probability of voter decisiveness in the outcome of an election is unrealistic, for the reasons noted in Whitcomb v. Chavis, supra. That calculation assumes "that all combinations of voters are equally likely," an assumption which "is not particularly sensible in a context where partisanship, race, or other characteristics impinge on voter choice and are related to voters' expected policy benefits from particular election outcomes." Grofman, Fair and Equal Representation, 91 Ethics 477, 479-80 (1981) (footnote omitted). See also Grofman and Scarrow, The Riddle of Apportionment: Equality of What, 70 Nat'l Civic Rev. 242, 245-46 (1981) (Banzhaf model ignores ingrained partisan preferences, as well as voting habits, that have an impact on election outcome).

It is not only at the level of voter decisiveness in election outcomes that we detect a lack of realism. The Banzhaf analysis is seriously defective in the way it measures Board members' power to determine the outcome of a Board vote. The problem is that it gives the same weight to and assumes the same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can determine outcome. See note 2, supra. This assumption ignores, however, "the deference that the Board traditionally pays to the views of borough presidents on matters affecting their boroughs in particular ways." Brief for Board of Estimate at 35. This tradition of "collegiality" means that a borough president often if not usually controls the votes of all five borough presidents on issues of local importance. It follows that, because the Mayor cannot vote

on certain budget items, a borough president with a special interest in the item can in effect control that item by himself. Even on non-budget matters, borough president collegiality results in all five borough presidents voting together on many issues.[6] As the amicus curiae Citizens Union of the City of New York points out, this means that the "552 equally possible voting combinations" assumed by Banzhafian analysis are purely theoretical.[7]

As the Board itself argues in its brief, "any mathematical device to measure discrimination in voting must bear a resemblance to the way the process really works." The Banzhaf index urged upon us by the Board makes unrealistic assumptions as applied in this case and accordingly does not pass that test. We recognize, of course, that the equal protection analysis of voter equality that the cases establish and that we

follow here -- the requirement that voters have an equal opportunity to elect representatives -- is not itself flawless, and certainly that the "equally populated districts" method of achieving such equality is likewise imperfect because it too must make assumptions that do not always mirror reality. See Grofman, Fair and Equal Representation, 91 Ethics 477, 480 n.8. Nevertheless, like the Court in Whitcomb, given the problems we have noted with Banzhafian analysis, we see insufficient reason "to depart from prior cases." And like Justice Harlan, dissenting in Whitcomb, discussing the effects of minor variations in assumptions in Banzhafian analysis, 403 U.S. at 169 n.5, we recall Mark Twain's comment that "[t]here is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling investment

of fact." Life on the Mississippi 109 (Harper & Row 1965).

We now turn to consider whether the district court should have modified the Abate test to take account of the citywide Board members in calculating voter inequality under the present system. We agree with the district court that the citywide Board members and borough presidents represent different interests, and that this divergence justifies measuring deviation from voter equality by applying the Abate test to the borough presidents alone. 592 F. Supp. at 1470-75.

We do not doubt that as members of a body that makes decisions having an effect on the entire city, the borough presidents keep in mind not only the special local interests of their constituents, but also the interests of the city as a whole. However, it is undoubtedly the case that a

representative will seek especially to advance the interests of those whose votes elect him or her. Indeed, this is a desirable state of affairs, and, as appellants and their amici urge, the very point of electing representatives from geographical areas. "[T]he very fact that representatives are severally related to distinct localities strongly implies that they have a special obligation to look after the desires and interests of the people in those localities ...." Pennock, Political Representation: An Overview, in Nomos X: Representation 12 (J. Pennock & J. Chapman eds. 1968). The apportionment cases clearly recognized the principle that an elected official "must be vigilant to serve the interests of all the people" upon whom his tenure depends. Fortson v. Dorsey, 379 U.S. 433, 438 (1965). See also Dusch v. Davis, 387 U.S. 112, 115 (1967).

Here, the Board's members primarily represent the interests of the different constituencies that elect them. The borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have qua residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests, and to represent primarily the interests of their constituents qua residents of New York City.[8] See Affidavit of Steven Brams, quoted by the district court, 592 F. Supp. at 1474 (Jt. App. at 890). There is no fiction involved in saying, for instance, that an individual resident of Brooklyn may have distinct and potentially differing interests qua Brooklyn resident and qua New York City resident. For example, from the point of view of the city as a whole, the best place for some necessary but

locally-disruptive facility, e.g., a toxic waste dump, might be in Brooklyn, whereas from the point of view of a Brooklyn resident who lives in the neighborhood of the proposed facility the site selected may appear to be the worst possible one. It has been the function of the Board of Estimate, consisting of representatives of each interest, to judge between them and to solve the coordination problems that otherwise would arise between the boroughs. See Affidavits of Herman Badillo (Jt. App. at 422) and Werner Kramarsky (Jt. App. at 25).

Viewing the Board in this light, we hold that in calculating voter equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis. It follows that, since the interests of Staten Island residents qua residents of that

borough have substantially identical representation on the Board to those of residents of Brooklyn, though Brooklyn is six times as populous as Staten Island, there are serious inequalities in the representation of residents of the different boroughs. Indeed, this is what the Abate test demonstrates and quantifies, a 132.9% maximum deviation from voter equality.

We wish to make it plain that we use the concept of "interest representation" in this case only in order to determine how the Board is to be analyzed for the purpose of applying the Abate test, a test that itself measures the representation of people, not of interests. Our approach is thus in accord with what has been the Supreme Court's insistence that the Equal Protection clause requires the equalization of voter representation, not interest representation. See, e.g., Reynolds v. Sims, 377 U.S. at

562 ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."). On the contrary, the Board's argument, for example, that "[r]eapportionment according to exact population ... would reduce the Staten Island borough president to the status of a bystander in the Board's deliberations," Brief at 12, obviously is thinking of equal protection in terms of equal representation of interests -- here, borough interests. That view, in light of Reynolds and its progeny, is untenable. The design of the Board, which gives equal weight to each borough's interests, has devalued concomitantly the votes of individual residents of Brooklyn and Queens, and has grossly overvalued the votes of Staten Island residents. The result is exactly what the Equal Protection clause forbids: "the elevation of a small class of

'supervoters' granted an extraordinarily powerful franchise." Brown v. Thomson, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

Having held that the district court correctly found a maximum deviation from voter equality of 132.9%, we turn next to consider whether the Board's current structure is justified by considerations of such moment that they outweigh this gross deviation from equality. We assume, for this purpose, but do not decide, that a deviation so substantial as this might in some circumstances be justifiable, given the greater flexibility accorded to local government bodies, Abate, 403 U.S. at 185, though we harbor not inconsiderable doubt as to whether this is so.

Following this court's instruction that the district court "rule on the policies and interest [sic] which the Supreme Court has

held may justify deviations form the literal one person, one vote formula," Morris v. Board of Estimate, 707 F.2d at 690, the district court directed the parties to submit a joint stipulation setting forth the agreed valid policies and interests presently served by the Board and the disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board. 592 F. Supp. at 1477. The parties did so, and the district court after argument and papers issued another opinion, Morris v. Board of Estimate, 647 F. Supp. 1463 (E.D.N.Y. 1986), considering the various justifications, including the claims of no injury, uniqueness, effectuation of delegated police power responsibilities, equal Board voting power, historical practice, respect for natural boundaries, integrity of political subdivisions, effectiveness, meaningful representation of smaller

boroughs in Board affairs, and checking the mayor and supplementing the city council, i.e., promoting separation of powers. The district court recognized properly that the defendants had the burden of justification. Brown v. Thomson, 462 U.S. at 842-43; see also Mahan v. Howell, 410 U.S. 315, 328 (1973); Karcher v. Daggett, 462 U.S. 725, 740-41 (1983). Beyond weighing the assorted justifications, the district court scrutinized alternatives, pursuant to Connor v. Finch, 431 U.S. 407, 420 (1977), and Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). See 647 F. Supp. 1475-78. The court found that alternatives "have been suggested that would 'substantially vindicate' the accepted policies and interests 'yet approximate population equality more closely,' " 647 F. Supp. at 1478 (quoting Karcher, 462 U.S. at 741). It held that the "existing plan with its much greater

departure from franchise equality does not advance the valid policies and interests." Id.

On the basis of the thorough analysis and reasoning of Judge Neaher in Morris v. Board of Estimate, 647 F. Supp. 1463, 1479, we affirm his judgment which very wisely enjoined the city defendants to undertake curative measures "with all deliberate speed." We understand that they are doing so, and when this case returns to the district court, we hope that an appropriate charter provision will be proposed accordingly. In the meantime, though flawed, the Board of Estimate may continue to function. Six months should be a target area, one year a deadline.

Judgment affirmed.

1. See Reapportionment: Law and Technology 8 (A. Wollock ed. 1980).

2. The Banzhaf index calculates an individual voter's power to affect the outcome of a Board vote, by first calculating the power of each member of the Board to affect the outcome of a Board vote, and then calculating the voter's power to cast the determining vote in the election of his representatives on the Board.

There are 552 possible voting combinations in which any one member can affect the outcome of a Board vote. Each borough president can cast the determining vote in 48 of these combinations (giving him a "voting power" of 8.7%), while each at-large member can determine outcome in 104 of 552 combinations (18.8%). Banzhaf calculates a citizen's voting power through each representative by dividing the representative's voting power by the square root of the population represented, and a citizen's total voting power by adding his power through each of his four representatives -- borough president, mayor, comptroller, and council president. Deviation from ideal voting power is then calculated by comparing this figure with that arrived at where one substitutes an electoral district of ideal population. Amicus Banzhaf sets out his calculations in the following table:

## CALCULATION OF DEVIATIONS IN CITIZEN VOTING POWER IN THE PRESENT NEW YORK CITY BOARD OF ESTIMATES [sic]

| A. MEMBER, AND POPULATION VOTES REPRESENTED ON BOARD | B. NUMBER OF | C. MEMBER'S VOTING POWER ON BOARD | D. CITIZEN'S VOTING POWER THRU 1 MEMBER | E. CITIZEN'S TOTAL VOTING POWER | F. PERCENT DEVIATION COLUMN E |
|---|---|---|---|---|---|
| BROOKLYN 2,230,936 | 1 | 8.7 | .00582 | .0271 | -5.15% |
| QUEENS 1,891,325 | 1 | 8.7 | .00632 | .0276 | -3.37% |
| MANHATTAN 1,427,533 | 1 | 8.7 | .00728 | .0285 | -0.25% |
| BRONX 1,169,115 | 1 | 8.7 | .00805 | .0293 | +2.55% |
| STATEN I. 352,121 | 1 | 8.7 | .01467 | .0359 | +25.65% |
| MAYOR 7,071,030 | 2 | 18.84 | .00709 | The total of these three figures, .021256, is added [to] the figures in Column D to calculate Column E. | |
| COMPTROLLER 7,071,030 | 2 | 18.84 | .00709 | | |
| COUN[CIL] PRES. 7,071,030 | 2 | 18.84 | .00709 | | |
| AVG. DIST. 1,414,206 | 1 | 8.7 | .00731 | .02857 | 00 |

C. -- Numbers in Column C are calculated using the Banzhaf voting power index.

D. -- Numbers in Column D are calculated by dividing the figure in Column C by the square root of the population represented by each member, since the ability of a citizen voter to affect outcomes varies as the inverse [of] (1 divided by) the square root of the population.

E. -- Numbers in Column E are calculated by adding to the figure in Column D for each borough representative, the voting power the citizen of the borough has through the three citywide representatives [3 x .00709=.021256, excluding rounding error].

F. -- Numbers in Column F are calculated by comparing the numbers in Column E with the corresponding figures for that of one of the average districts which would be formed if the non citywide members were each elected from districts with equal population.

The Banzhaf index thus gives a maximum deviation of 30.8%.

See generally Banzhaf, One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation, 36 Geo. Wash. L. Rev. 808 (1968).

3. Intervenor Ponterio would equate the Board to a floterial district. For the reasons stated by Judge Neaher, 592 F. Supp. at 1469-70, we reject the analogy.

4. Where only single member districts are involved "[a] specific definition of 'voting strength' is unnecessary because each citizen gets the same degree of 'representation,' regardless of the meaning of that term." Charo, Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 777 (1985).

5. Appellants seek to distinguish these cases on the ground that in each of them the at-large members controlled only a minority of the votes of the body, whereas here the three at-large members, with two votes each, constitute a 6-5 majority. See also Charo, supra note 4, at 776 ("[N]one of these cases have presented a situation in which at-large representatives have a majority voting bloc. This is a significant qualitative difference in the organization of the Board's voting structure" (footnote omitted)). But in the present case this distinction is inadequate. First, the exclusion in each of these cases of at-large members from an analysis of voter inequality -- when their inclusion would clearly affect the level of inequality eventually found -- can be traced most clearly perhaps to an underlying theory that holds (whatever

else it holds) that voter power over outcome is irrelevant to equal protection analysis. At the level of determining, as we must, what the precedents hold is to be equalized among voters under the Fourteenth Amendment, the distinction between a minority or majority of at-large votes might almost be called a red herring. For in the typical case there is no principled reason (nor do appellants attempt to provide one) why <u>different basic theories</u> of equal protection should apply depending on the size of the at-large membership. We find absolutely no evidence that, in the instant case, the distinction on which the appellants rely is a qualitative difference, as opposed to a difference of degree. We say that, knowing also, or at least believing along with William James, that a difference between a difference of kind and a difference of degree is itself a difference of degree.

There may, of course, be circumstances in which a different result might be required. If the at-large bloc was not simply a majority, but a majority such that it would always and necessarily control the governing body, and the district representatives play a decidedly subsidiary role, as in appellants' hypothetical of a body with the same composition as the Board, but in which the three at-large members have 100 votes each and the five single district representatives one vote each, then the precedents might easily be distinguishable and a different analysis might be called for. But that is not this case and we find it unnecessary to

speculate on the test to be applied in such a case. Though the appellant Board insists on referring to "an at-large majority voting bloc," in fact there is no such "bloc." Rather, this supposed "bloc" consists of three persons having two votes each who are free to, and do, vote on different sides of various issues. See affidavit of Herman Badillo, discussed infra note 7. Only if all three vote together are they bound to carry the day. Furthermore, on certain budget issues, on which the mayor does not vote, the at-large members cannot win a vote without the support of a borough president. It follows that there is no majority at-large voting bloc bound to control the Board and that this case is far removed from the hypotheticals offered by the Board and Amicus Banzhaf.

6. Furthermore, the borough presidents "often succeed in persuading the citywide members to observe" the practice of borough courtesy. W. Sayre & H. Kaufman, Governing New York City 638 (1960):

> The Borough Presidents bring to the Board neither the impressive formal powers of the Mayor or of the Comptroller, nor the ambiguous potential of the President of the Council; instead, each Borough President brings to the Board a consciousness that he represents a county party organization with which (unless he is a Fusion official) he ordinarily has close ties, and that he has the formal capacity to claim that he

speaks, as no other member of the Board can, for the special interests of his borough. These are claims difficult to dispute, risky to ignore. Moreover, the Borough Presidents sense their common cause as a group in the Board, maintain together a practice of "borough courtesy" which they often succeed in persuading the citywide members to observe, while in addition they seek to join with the Comptroller in a bargaining alliance which can guide the Board in the majority of its decisions.

7. We note two further facts that distort the occurrence of the 552 possible voting combinations. The first is the Board's "cult of unanimity," W. Sayre & H. Kaufman, supra note 6, at 643, whereby the Board members make efforts, by behind-the-scenes brokering, to reach unanimous decisions. The second is the practical insight provided in the affidavit of Herman Badillo, a former member of the Board, that citywide members are often divided on important issues, at least in part because "the Comptroller and City Council President are often engaged in an ongoing campaign for the Mayor's office," while at the same time the mayor is running for reelection, and because taking different stands on high-profile issues is necessarily part of the citywide members' effort at "distinguishing themselves from one another in their incessant quest for the mayoralty."

8. It may be that citywide representatives will be more responsive to "Brooklyn" interests, because of the greater number of Brooklyn voters. While this may mitigate somewhat the effects of the deviation in voter equality, the mitigation is at best theoretical and in no way substantial enough to counteract the 132.9% deviation.

JON O. NEWMAN, Circuit Judge, concurring:

I concur in Jude Oakes' thoughtful and comprehensive opinion for the Court but add a few words to emphasize what we are invalidating and what representation arrangements remain for future consideration. The New York City Board of Estimate allots two votes to each of its three at-large members and one vote to each of its five borough representatives. On budget matters, the mayor cannot vote, leaving only two at-large members, each with two votes; the mayor's authority to influence budget decisions derives from his power to veto the budget. It is this precise arrangement of voting power that we find unconstitutional under circumstances where the aggregate deviation from equality among the five boroughs is 132 percent.

As Judge Oakes acknowledges, we are not confronted with an arrangement whereby at-large voting power in the Board of Estimate substantially outweighs the combined voting power of the borough representatives. That could be accomplished either by increasing the number of votes cast by each at-large member or by increasing the number of at-large representatives, even if each is only a single vote; combinations of these two approaches are also possible.

Until today the only cases considering the constitutionality of representation arrangements that combine district representation with at-large representation have involved bodies in which the voting power of the at-large members was a small fraction of the total voting power. In most of these cases, there was only one at-large member (entitled to cast one vote), compared to several district representatives. E.g.,

Avery v. Midland County, 390 U.S. 474 (1968) (one at-large out of five-member body); Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) (one out of six); Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975) (one out of eleven); Markoe v. Legislature of Virgin Islands, 592 F.2d 188 (3d Cir. 1979) (one out of fifteen). One case involved four at-large members, but they were still a minority of a thirteen-member body. Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012 (D. Mass.); stay denied, 716 F.2d 68 (1st Cir.), stay denied, 463 U.S. 1319 (Brennan, Circuit Justice, 1983). With the at-large representation so insubstantial, the courts examined only the deviations of the populations of the districts. Deviations among the districts were found impermissible in Avery, Martin and Latino, and acceptable in Perry and Markoe. In our

case the voting power of the at-large members is relatively larger: they have a one-vote majority of the voting power on the Board of Estimate (six of eleven votes), though they lack even this edge on budget matters (four out of nine votes).

At some point, the size of the voting power of the at-large members, compared to that of the district members, would make the at-large representation not only relevant but decisive on the issue of constitutionally valid apportionment. If a body included 100 at-large members, for example, the existence of one representative from each of five districts of different populations could not seriously be thought to offend constitutional standards. Especially as to local governmental bodies, where apportionment standards are applied with some flexibility, see Abate v. Mundt, 403 U.S. 182, 185 (1971), equal protection requirements do not

prohibit inventive arrangements that combine substantial representation of the electorate at-large with single-member districts of differing populations. The Equal Protection Clause forbids arrangements under which the voting strength of voters in one or more small districts outweighs the voting strength of voters in one or more large districts and district representatives exercise substantial voting power within the elected body. But where at-large representatives have the dominant voting power, the allotment of at least one voice and vote to each of a small number of districts, regardless of size, preserves the virtues of local representation without sacrificing principles of equal protection.

Doubtless it will be difficult in some cases to draw the line between adequate and inadequate at-large voting power. At one extreme, it is clear that 100 at-large

members would be sufficient to tolerate even large deviations among the populations of five single-member districts. At the other extreme, it is clear that one at-large member is insufficient to tolerate such deviations, as Avery and Martin demonstrate, and even that four out of thirteen are insufficient, as Latino demonstrates. In our case, I agree that at-large voting power of six out of eleven on most issues and four out of nine on budget issues is not sufficient to permit us to ignore the substantial aggregate deviation of the five boroughs that each send one representative to the New York City Board of Estimate. That is what we have decided; what we have not decided, and need not decide, is the point at which an apportionment according substantial voting power to at-large representatives would satisfy constitutional requirements, notwithstanding otherwise unacceptable

deviation among the populations of a small number of single-member districts.

OPINION AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK, DATED NOVEMBER 19, 1986
81 CV 3920 (ERN)

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BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellees,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant.

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APPEARANCES:

RICHARD EMERY, ESQ.
ARTHUR EISENBERG, ESQ.
New York Civil Liberties Union
New York, New York
Attorneys for Plaintiffs

FREDERICK A.O. SCHWARZ, JR., ESQ.
Corporation Counsel, City of New York
New York, New York
Attorney for Defendants
By: SUSAN R. ROSENBERG, ESQ.

FRANK V. PONTERIO, ESQ.
Staten Island, New York
Intervenor-Defendant Pro Se

THE HON. ROBERT A. STRANIERE
Staten Island, New York
Intervenor-Defendant Pro Se

ALAN ROTHSTEIN, ESQ.
Citizens Union of New York
New York, New York
Amicus Curiae

THE HON. JOHN J. MARCHI
Staten Island, New York
Amicus Curiae

NEAHER, Senior District Judge

This action challenges the constitutionality of the New York City Board of Estimate ("Board"). Familiarity with previous decisions herein is assumed. See Morris v. Board of Estimate, 551 F. Supp. 652 (E.D.N.Y. 1982), rev'd, 707 F.2d 686 (2d Cir. 1983), on remand, 592 F. Supp. 1462 (E.D.N.Y. 1984).

In brief summary, plaintiff residents of the Borough of Brooklyn instituted this action contending that, pursuant to sections 61 and 62 of the New York City Charter, the allocation of one vote to each Borough President, as members of the Board, contravened the "one person, one vote" rule of the United States Supreme Court because of the widely disparate populations each Borough President represented. This court, following the remand, applied the test adopted by the Supreme Court in Abate v. Mundt, 403 U.S. 182 (1971), and found a deviation of 132.9% as between the populations of Staten Island (Borough of Richmond) (352,121) and Brooklyn (2,230,936). Such a large deviation -- more than 10 times that permitted in Abate (11.9%, coupled with a caution) -- strongly signalled that the Board's present voting allocation is unconstitutional. Mindful, however, of the

Court of Appeals' instruction that this court "rule on the policies and interests which the Supreme Court has held may justify deviations," Morris v. Board of Estimate, 707 F.2d at 690, the parties were directed to submit a joint stipulation setting forth:

> "(1) those agreed valid policies and interests presently served by the Board; and
>
> (2) those disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board ...."

592 F. Supp. at 1477 (emphasis in original).[1]

## DISCUSSION

### I. Justification Burden

The Supreme Court has made it clear that the existence of malapportionment places the burden upon defendants. As the Supreme Court pointed out in Brown v. Thomson, 462 U.S. 835, 842-43 (1983):

> "A plan with larger disparities ... [than 10%] ... creates a prima

facie case of discrimination and ... must be justified by the State."

Arguably, even were the disproportion explainable, defendants here might ultimately fail their justification task, since the Supreme Court has warned that immoderate inequalities may be intolerable whatever the meritorious objectives. See, e.g., Reynolds v. Sims, 377 U.S. 533, 581 (1964) ("But if, even as a result of a clearly rational state policy ..., population is submerged as the controlling consideration in ... apportionment ..., then the right of all ... citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."); Gaffney v. Cummings, 412 U.S. 735, 744 (1973) ("[T]he larger variations from substantial equality are too great to be justified by any interest so far suggested.").

Those warnings together with the huge 132.9% inequality afford a basis for the

formidable charge by Citizens Union that the Board's voting plan is facially unconstitutional. See e.g., Preisler v. Mayor of St. Louis, 303 F. Supp. 1071, 1075 (E.D. Mo. 1969) (The 135% deviation for aldermanic wards was beyond excusing.).

Still, despite its admonitions, the Supreme Court has never established a figure for per se illegality. Thus, in Mahan v. Howell, 410 U.S. 315, 329 (1973), the Virginia House of Delegates' 16.4% rationalized deviation was sanctioned, a guarded approval being left indefinite by the Supreme Court's comment that:

> "While this percentage may well approach tolerable limits, we do not believe it exceeds them."

More recently, in Brown v. Thomson, 462 U.S. at 846-48, the majority upheld a plan for the Wyoming House of Representatives, the question presented having excluded an 89% disproportion from

consideration. Joining that circumscribed decision, Justice O'Connor nonetheless emphasized that "clearly some outer limit" to acceptable disparities exists. Id. at 849-50 (O'Connor, J., concurring).

Like the Mahan comment, however, Justice O'Connor's did not specify that "outer limit", obviously because one has not been set. In other words, though consistent with the cautionings against large deviations, these comments indirectly underscore that:

> "[T]he [Supreme] Court has never enunciated specific maximum variations which will invalidate a reapportionment ...."

Boyer v. Gardner, 540 F. Supp. 624, 629 (D.N.H. 1982).

Viewed in that light, not reaching the yet unquantified question of facial unconstitutionality -- if possible -- is preferable and actually follows the Supreme Court's example.

"We are doubtful ... that the deviations [for the Texas House of Representatives] evident here [about 26%] are the kind of 'minor' variations which Reynolds v. Sims indicated might be justified by ... the maintenance of established political subdivisions .... ... But we need not reach that constitutional question, for we are not convinced that the announced policy ... necessitated the range of deviations between legislative districts .... ... [Among other deficiencies in its findings,] the District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans ..., which respected county lines but which produced substantially smaller deviations from the principles of Reynolds v. Sims."

Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). Fortunately, that restrained approach settles the equal protection challenge here. As will be seen, defendants fail their justification burden short of the per se query.

A. Issues

As pointed out in Brown v. Thomson, 462 U.S. at 843 (quoting Mahan v. Howell,

410 U.S. at 328) the general justification stage investigation is:

> "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.' "

Dissenting in Brown v. Thomson, 462 U.S. at 852, Justice Brennan elaborated upon that basic inquiry. After a prima facie 10% variance demonstration, the remaining steps are:

> "Second, a court must consider the quality of the reasons advanced by the State to explain the deviations. Acceptable reasons must be 'legitimate considerations incident to the effectuation of rational state policy,' Reynolds [v. Simms, 377 U.S. 533,] 579 [(1964)], and must be 'free from any taint of arbitrariness or discrimination,' Roman [v. Sincock, 377 U.S. 695,] 710 [(1964)]. See Mahan v. Howell, 410 U.S. 315, 325-26 (1973). Third, the State must show that 'the state policy urged ... to justify the divergences ... is, indeed, furthered by the plan.' id., at 326. This necessarily requires a showing that any

deviations from equality are not significantly greater than is necessary to serve the State's asserted policy; if another plan could serve that policy substantially as well while providing smaller deviations from equality, it can hardly be said that the larger deviations advance the policy. See e.g., Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967); Mahan, supra, at 319-20, 326 Connor [v. Finch, 431 U.S. 407,] 420-21 [(1977)]. Fourth, even if ... the deviations ... are justified ..., the court must nevertheless consider whether they are small enough to be constitutionally tolerable .... Mahan, supra, at 326."

As a minority opinion, Justice Brennan's explication is not controlling. In a larger perspective, however, his detailed guide is consistent with the majority's broad statement and cogently distills the Supreme Court's antecedent body of law.

Looking to that guide, the first step (the malapportionment stage) has been taken and the fourth (essentially a per se evaluation) will not be for reasons just given. The second and third steps are left,

their respective issues being whether defendants' proffered policies and interests are valid concerning the Board, and if so, whether its current voting plan furthers them.

Regarding the validity issue, the Supreme Court has not precisely defined the characteristics of legitimate goals. See Reynolds v. Sims, 377 U.S. at 579; Roman v. Sincock, 377 U.S. at 710 (both quoted in Brown v. Thomson, 462 U.S. at 852, supra pp. 7-8). See also Swann v. Adams, 385 U.S. 440, 444 (1967) ("satisfactory explanation[s] grounded on acceptable state polic[ies]"); Karcher v. Daggett, 462 U.S. at 740 (objectives "consistent with constitutional norms"). See generally Cohen v. Maloney, 410 F. Supp. 1147, 1151 (D. Del 1976) (considerations "constitutionally acceptable").

Nor has it announced an all-inclusive list. See Karcher v. Daggett, 462 U.S. at 740 ("Any number of consistently applied legislative policies might justify some variance ...."). See generally Tribe, American Constitutional Law, Ch. 13, § 6 (1978) ("[T]he scope of permissible justifications remains unclear.").

Nevertheless, the Supreme Court and lower tribunals have countenanced certain considerations germane here. See generally Charo, Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 803 (1985) ("Charo") ("[The] Board ... exhibits many, but not all, of the characteristics of local government that the Supreme Court has singled out for special protection from the

stress caused by searching for perfect population equality.").

The furtherance issue explores (in part) whether another plan would "substantially vindicate" the identified rational objectives "yet approximate population equality more closely." Karcher v. Daggett, 462 U.S. at 741. If the answer is yes, the plan under review is constitutionally deficient. See Guido, Deviations and Justifications: Standards and Remedies in Challenges to Reapportionment Plans, 14 Urb. Law. 57, 68 (1982) ("Even though a rational state policy may justify population variances, the courts will not uphold a plan ... if an alternative ... achieves that policy with a lower level of deviation.").[2]

As relevant to those issues, defendants in the Joint Stipulation of Policies and

Interests proffer these considerations in support of maintaining the status quo:

"1. Absence of any demonstrable injury to the populations of the more heavily populated boroughs as a consequence of requiring equal votes among the boroughs, particularly in light of the presence on the Board of three members - the Mayor, the Comptroller and the City Council President - who are elected by all the voters in all the boroughs, who each have two votes, and who in the aggregate outvote the five borough presidents.

2. Uniqueness of the Board as a form of local government because of its composition and voting allocation.

3. Meaningful representation of the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.[3]

4. Preservation of the boroughs as legitimate representational entities in local government.

5. Use of natural and historical borough boundaries to define representational entities in local government.

6. Historical treatment of the boroughs as separate governmental entities.

7. Necessity of retaining borough representation on the Board in light of

abolition of such representation on the City Council.

8. Effectiveness of a Board comprised of only eight members.

9. The long-standing dual role of borough representatives as both Borough Presidents and the member of the Board.

10. Coordination of City and borough governmental authority and responsibility.

11. Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole.

12. Flexibility to meet changing societal needs, particularly in a large municipality whose local government is complex.

13. Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars.

14. Necessity and effectiveness of borough representation in local government as an intermediate size entity, with city-wide representation

being larger and community board representation being smaller.

15. Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

16. Effectuation of delegated police-power responsibilities.

17. Equality of voting power on the Board among the boroughs, as boroughs."

1. Validity Issue

Four of the foregoing policies and interests must be rejected as manifestly invalid.

No Injury (Number 1)

The asserted absence of harm disregards the Supreme Court's decisions to the contrary. See e.g., Chapman v. Meier, 420 U.S. 1, 24 (1975) ("The basis for the District Court's allowance of the 20% variance [among senatorial districts for the North Dakota Legislative Assembly] is

claimed to lie in the absence of 'electorally victimized minorities' .... ... [A] variance of this degree [in a court-ordered plan] cannot be justified simply because there is no particular racial or political group whose voting power is minimized or canceled. All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.").

Directly put, the 132.9% variance evidences the harm - as have mathematical assessments of legislative designs since the early years of judicially mandated suffrage equality.

> "[O]vervaluation of the votes of those living here has the certain effect of ... undervaluation of the votes of those living there. The

> resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor."

Reynolds v. Sims, 377 U.S. at 563.

Moreover, the political harm should come as no surprise to those defendants who were also parties in Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir.), aff'd sub nom. Giacobbe v. Andrews, 459 U.S. 801 (1982). There, after isolating a 50.4% variance among these same boroughs under the City Council's former plan, this court said:

> "On the undisputed facts it is obvious that a voter in the Bronx or Staten Island gets substantially more representation for his or her ballot than a voter in Brooklyn or Queens. The effect is to deprive voters in the latter boroughs of an equal opportunity to participate in the political process."

Id. at 251.

Defendants' contention that no injury occurs, partially due to the city-wide members' supposed salutary effect on the disparity, is essentially an attempted relitigation of the malapportionment methodology and deviation issues. In deciding those issues, the court extensively examined and distinctly rejected the at-large mitigation argument, concluding that:

> "Nor does the city-wide presence dictate adjusting [the] methodology [to account for their alleged influence on the disproportion]. As prior decisions properly have done, the at-large representation should be eliminated from the deviation computation. That approach comports with the Board's existing theoretical relationships, with the common sense limitation on valid mathematical assessment and, ultimately, with the Supreme Court's guidance."

Morris v. Board of Estimate, 592 F. Supp. at 1475.

To be fair, the perspective of the city-wide representatives on the Board surely contributes to its performance. See e.g., New York State Charter Revision Commission Report at 84 (1975) ("The Board ... is well structured to make important political decisions and to resolve conflicts between city-wide and local interests ... Its mixture of city-wide and borough officials provides a balanced perspective."); Kramarsky Aff. and Ex.: "The Kramarsky Study" at 115 ("These three officials are concerned with the welfare of the city as an entity; it is left to the Borough Presidents to add local ... opinion to the Board's deliberations. Needless to say, the Borough Presidents are equally as concerned with city-wide policy .... It must be recognized, however, that they are often subjected to more intense local pressures.").

In that vein, defendants have put forth other concerns enveloping the benefits of the at-large members' "big picture" orientation. See Joint Stipulation of Policies and Interests: Numbers 10, 11 and 13. In contrast, when proposing - as in Number 1 - that the city-wide officials ameliorate the 132.9% disproportion so no inequality injury is incurred, defendants collide head on with elementary reapportionment jurisprudence and the law of this case.

Uniqueness (Number 2)

The Board's purported uniqueness is likewise unavailing, although for discussion's sake its truth is assumed. See Professor Heywood T. Sanders' Sup. Aff. in Support of Pl. Motion for Summary Judgment at 4 ("[The] Board ... has no precise analogue in other cities, as it constitutes the last example of a 'bicameral' local legislature."). But see Morris v. Board of Estimate, 592 F.

Supp. at 1468 ("[T]he Board's essential [borough and at-large] electoral design is unexceptional ....") (emphasis in original) (examples cited).

Cognizable considerations must have some political utility, as do "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Karcher v. Daggett, 462 U.S. at 740. Uniqueness, a static quality, serves no such pragmatic purpose. See generally, Reynolds v. Sims, 377 U.S. at 579 ("legitimate considerations incident to the effectuation of a rational state policy") (emphasis added.).

Police Power (Number 16)

Police power fares no better for a different reason. See Br. of I. Def. Ponterio at 27 ("The State ... has made it eminently clear that in delegating police

power to municipalities it places great importance on such municipalities having strong and effective governments.") (citing N.Y. Const. art. IX, § 1 (McKinney 1969); N.Y. Exec. Law § 150 (McKinney 1982)).

Where uniqueness offered too little, police power offers too much. Presumably, all States desire strong local governments for facilitating the provision of municipal services. See Avery v. Midland County, 390 U.S. 474, 481 (1968) ("[State l]egislators ... do not attempt to reach those countless matters of local concern .... [I]n providing for [local] governments ..., the States characteristically provide ... for decisionmaking at the local level .... ... In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life ....").

That generality removes police power as a legitimate aim candidate. See Karcher v. Daggett, 462 U.S. at 741 ("The State must ... show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions.").

Equal Borough Votes (Number 17)

The last consideration rejected is equal Board voting power for the boroughs. The one borough, one vote proposition clashes with the one person, one vote rule. The Constitution does not mandate identical votes for boroughs with widely disparate populations. See Andrews v. Koch, 528 F. Supp. at 249 (Rejecting a muted version of the same representational reasoning, this court said: "[T]he difficulty with defendants' position is that the Supreme Court has consistently adhered to quite different standards in assessing the

conformity of electoral plans to constitutional requirements.").

It directs, instead, that any citizen shall have a vote equal to any other citizen -- no matter the borough of either. See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

It is a citizen's right -- not a borough's -- which is the equal protection center of attention. See Reynolds v. Sims, 377 U.S. at 561 ("[T]he rights allegedly impaired are individual and personal in nature .... While the result of a court decision ... may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining

whether there has been any discrimination against certain .. citizens which constitutes an impermissible impairment of their constitutionally protected right to vote."). For this quantitative case, the one person, one vote rule means all citizens are to possess parity of franchise - not the Borough Presidents.

A subsidiary point is pressed to sustain the status quo.

> "A change in the Board's composition and voting strength would be a breach of an implied condition under which [Staten Island] gave up its own self governance and entered into Greater New York in 1898 and would result in [its] residents ... being deprived of a chance to influence decisions which have a great impact upon their county's future."

Aff. of John J. Marchi at 19.

Obviously, any such tacit agreement has been nullified by post Baker v. Carr, 369 U.S. 186 (1962), caselaw. In 1968, the Supreme Court placed local governmental

units within the equal protection mantle. See Avery v. Midland County, 390 U.S. at 478-79 ("The question ... is whether the Fourteenth Amendment ... forbids the election of local government officials from districts of disparate population. [W]e hold that it does."). In 1983, the Second Circuit did the same with the Board. See Morris v. Board of Estimate, 707 F.2d at 690 ("[T]he Board ... is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable."). This latter day jurisprudence abrogated Staten Island's turn of the century, implied condition. Thus, in all respects, the equal borough votes consideration is not "constitutionally acceptable." Cohen v. Maloney, 410 F. Supp. at 1151.

Turning now to defendants' remaining policies and interests, these will be

appraised in groups also as to their validity, and if weathering that issue, as to their furtherance by the Board's voting plan.[4]

Historical (Numbers 5, 6 and 9)

Since the 1898 consolidation, the boroughs have comprised the City. Correspondingly, since the 1901 Charter, the Board has reflected the metropolitan makeup with its Borough President membership.

Unquestionably, the City's government has centralized with authority moving from the boroughs. See Aff. of Loring McMillen at 6 ("[T]hrough several charter revisions, the powers of the Borough Presidents were decreased substantially with many responsibilities shifted to the Mayor."). Similarly, citizen-borough ties have loosened. See Aff. of Edward L. Sadowsky at 4-5 ("[T]here has been a considerable erosion in the identity which citizens make with the boroughs in which they live .... ... [T]he

citizens of the Bronx and Brooklyn ... are likely [to] refer to themselves as coming from communities within a borough rather than the borough itself.").

Notwithstanding, whether primary residential referents or not, the boroughs are areas of dwelling. As such, they continue to be political entities for purposes of voting and representation in City affairs. Thus, the Board of Education, the Board of Trustees of the City University, the Industrial Development Agency, the Board of Elections and the Planning Commission are all statutorily required to have (appointive) borough representation. See N.Y. Educ. Law § 2590-b (McKinney 1981); id. § 6204 (McKinney 1985); N.Y. Gen. Mun. § 917 (McKinney 1986); N.Y. Elec. § 3-200 (McKinney 1978); New York City Charter & Ad. Code Ann. § 192 (Williams Press 1976), respectively.

As with those City agencies, the Board's time-rooted membership evidences on-going borough residential-political consciousness. Against that background, history is a valid concern as to the Board. See Abate v. Mundt, 403 U.S. at 186 ("Rockland County defends its plan by asserting the long history of, and perceived need for, close cooperation between the county and its constituent towns .... For over 100 years, the five town supervisors were the only members of the county board, a system that necessarily fostered extensive interdependence between the towns and their county government.").

Natural Boundaries (Number 5)

Entwined with the historical consideration is respect for natural boundaries, also a judicially recognized objective. See Reynolds v. Sims, 377 U.S. at 578-79 (mentioning it and other goals as

potentially legitimate). When consolidated, the boroughs were mainly divided along geopolitical lines. See e.g., New York State Charter Revision Commission Report at 5 (1973) ("The borough of Manhattan was comprised of Manhattan, Governor's, Bedloe, Ellis, Oyster, Blackwell's, Randall's and Ward's Islands."). With its borough delegates, the Board retains a deference for those divisions. Heeding natural boundaries is an acceptable consideration.

Integrity of Political Subdivisions
(Numbers 4, 6, 7, 9 and 14)

For clarification, acknowledging the integrity of political subdivisions means accounting for the boroughs as subordinate governmental units. This category may be the strongest. See Abate v. Mundt, 403 U.S. at 185 ("[A] desire to preserve the integrity of political subdivisions may justify [a local government's] apportionment plan which departs from numerical equality

...."); Brown v. Thomson, 462 U.S. at 843 ("[T]he Court in Reynolds v. Sims ... singled out preservation of political subdivisions as a clearly legitimate policy.").

Plaintiff's [sic] particularly concede that:

> "this interest is clearly cognizable .... Each of the five vestigial county government[s] constitutes a political subdivision of the City ... deserv[ing] to have its integrity respected .... As long as the chief executives of the county governments are representatives on the Board, there will be no necessity to compromise the integrity of these subdivisions."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 34-35. See generally Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 210 (S.D.N.Y.), aff'd, 742 F.2d 1434 (2d Cir. 1983) ("New York's public policy to 'maintain municipal boundary lines in the [apportionment] of counties for representation purposes' is a 'legitimate

consideration' ....") (brackets by Greenwald court). The court subscribes to the parties' agreement.

Effectiveness

(Numbers 4, 8, 10, 11, 12, 13 and 14)

Effectiveness, the "ab[ility] to accomplish a purpose," Webster's Third New International Dictionary at 724, is an objective which the State has expressly embraced.

> "Effective local selfgovernment and intergovernmental cooperation are purposes of the people of the state."

N.Y. Const. art. IX, § 1 (McKinney 1969). See also N.Y. Exec. Law § 150 (McKinney 1982) ("The future welfare of the state depends in large measure on the effectiveness of local government and of its relationships to state government ....").

From 1901, the Board has been composed of those elected borough and city-wide officials with the greatest

metropolitan influence. That small, mixed assembly has proven conducive to accomplishing the Board's mission.

> "The strength of the Board ... rests, in part, on its mission 'to direct the business of the City.' It is the ability to resolve policy and priority disputes that characterizes the Board's ... preeminent position in the city government. The members ... each publicly elected, each with a broad and diversified constituency, and each in an executive position ..., represent a far greater consensus than any other executive body. Their relatively small number enables them to act more decisively than most legislatures."

Kramarsky Study at 16. See, e.g., Aff. of Edward I. Koch at 1 ("[T]he Board operates very effectively ... in helping to govern this complex city. Indeed, in the mid-1970's, the Board struggled with - but weathered - the most serious fiscal crisis with which any major American city has had to grapple in modern history.").

Concomitantly, by interacting with the matters presented to it, the Board has accumulated experience, in turn, contributing to greater effectiveness.

> "The resources of the City ... are limited, though the demands made ... are infinite. Therefore, resource allocation is necessary. The Board ... is the one [body] which has developed systems and expertise in the resolution of conflict between local and city-wide interest."

Kramarsky Study at 102. See e.g., id. at 66 ("[The Board]) ... posesses [sic] the intangible advantage of almost 70 [now over 80] years of experience with franchise questions ...."). See generally New York State Charter Revision Commission Report at 84 (1975) ("[The Board] has been a magnet for issues that require deliberative judgments in the best interests of the City as a whole, and it has repeatedly been assigned responsibility for sensitive matters

... not ... adequately handled by other bodies or officials.").

For the most, the litigants once again join, agreeing that the Board is effective.[5] See Charo, 53 Fordham L. Rev. at 739 ("[T]he Board represents a concentration of legislative, executive and administrative power in the hands of the eight most pre-eminent local officials ... making it efficient and effective ...."). Cf. Franklin v. Krause, 344 N.Y.S.2d 885, 888-89 (1973), appeal dismissed, 415 U.S. 904 (1974) ("[Nassau County's] small board ... is the most efficient form of government, and has proved to be such over the years.").

The court concurs, adding that, with regard to the Board, effectiveness is "a satisfactory explanation grounded on [an] acceptable state policy." Swann v. Adams, 385 U.S. 440, 444 (1967).[6]

## Meaningful Representation of Smaller Boroughs in Board Affairs (Numbers 3, 4, 7, 9, and 14)

Meaningful representation, another suggested concern, poses a formulation problem. See generally Note, Fair and Effective Representation: Power to the People, 26 Hastings L.J. 190, 206 (1974) ("Fair and effective representation defies precise definition."). For defendants, meaningful representation of smaller boroughs is evidently Board voting equivalence with large boroughs. As previously noted, the one borough, one vote notion is antithetical to the one person, one vote rule. The smaller boroughs must settle for less. Cf. Morris v. Board of Estimate, 707 F.2d at 691 ("[T]he fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy.").

Plaintiffs, in contrast, point out that:

> "Meaningful representation for the lesser populated boroughs is achieved when their borough presidents have influence and power over Board decisions [, approximately in proportion to population represented]."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 38.[7] See generally Iannucci v. Board of Supervisors of the County of Washington, 282 N.Y.S.2d 502, 508 (1967) ("[In a weighted voting system, t]he principle of one man-one vote is violated ... when the power of a representative to affect the passage of legislation by his vote ... does not roughly correspond to the proportion of the population in his constituency.").

So understood, meaningful representation is a cognizable objective, given the Board's small borough membership. See Morris v. Board of Estimate, 592 F. Supp. at 1476-77 (authorities therein). See

generally Brown v. Thomson, 462 U.S. at 843 ("There ... can be no question that Wyoming's constitutional policy - followed since statehood - of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns.").

Checking the Mayor, and Supplementing City Council (Numbers 7, 14 and 15)[8]

The offsetting of power among coordinate institutions is a fundamental of American democracy. See United Public Workers v. Mitchell, 330 U.S. 75, 91 (1947) ("By these mutual checks and balances ... democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."); Youngstown Co. v. Sawyer, 343 U.S. 579, 593 (1952) ("[The nation's founders] rested the structure of our central government on the

system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.") (Frankfurter, J., concurring).

The separation of powers' principle is not limited to the federal government but, as the New York Court of Appeals has made clear, is applicable to this State, and, as modified, to this City.

> "One of the fundamental principles ... underlying our Federal Constitution is the distribution of governmental power into three branches - the executive, legislative and judicial - to prevent too strong a concentration of authority in one person or body .... We have consistently recognized that this principle of separation of powers among the three branches is included by implication in the pattern of government adopted by the State .... ...
>
> Of course, the pattern of government established for New York City by the City Charter is not identical to that of the United States or the State .... Still, the City Charter does provide for distinct legislative and executive branches ... Thus, our prior

> decisions have held that ... the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council ...."

Under 21 v. City of New York, 492 N.Y.S.2d 522, 525-26 (1985) (The Mayor usurped the City Council's legislative power by promulgating an Executive Order barring City contractors from discriminatory employment practices involving "sexual orientation of affectional preference."). See also Subcontractors Trade Assoc. v. Koch, 477 N.Y.S.2d 120, 124, (1984) (Under a separation of powers analysis, the New York Court of Appeals held that the Mayor encroached on the City Council's legislative terrain by issuing an Executive Order directing that small, local businesses share 10% of City construction contracts.).

While not a formal executive or legislative branch member, the Board, with its county contingent participating, assists in markedly curbing extradepartmental

ascendancy. The Mayor, in particular, is checked, since having no budget and only two Board votes his role is limited. See generally W. Sayre & H. Kaufman, Governing New York City at 651 (1960) ("[T]he Board is not often led by the Mayor; instead, it unites against him if necessary, absorbs him into the Board as a member without special status if it can."). That circumscribed influence in a prominent political body curbs the Mayor in general. See id. at 632 ("The Mayor's membership on the Board is an asset to the Board, a liability to the Mayor.").

Along with restraining the Mayor, the Board supplements the City Council's role by providing a major forum for Borough Presidents to voice county interests.[9] See e.g., Andrews v. Koch, 528 F. Supp. at 251 (This court noted, among other avenues, that "channel[] of communication ... between the boroughs and City Hall."). See

generally Reynolds v. Sims, 377 U.S. at 580 ("A consideration that appears to be of more substance in justifying some deviations ... is that of insuring some voice to political subdivisions ....").

In sum, the Board, structurally embodying a county faction, counterbalances to an unusual extent the Mayor as well as supplementing the City Council. Those last suggested policies and interests "are consistent with constitutional norms." Karcher v. Daggett, 462 U.S. at 740.

2. Furtherance Issue

Validating the foregoing policies and interests lightens but does not relieve defendants of their burden of justification. They must also demonstrate that no alternative plan would satisfactorily embrace the legitimate considerations and diminish the deviation. If another alternative would do so, then the present plan "may [not]

reasonably be said to advance" the accepted goals. Mahan v. Howell, 410 U.S. at 328.

In Karcher v. Daggett, 462 U.S. at 741, the Supreme Court reconfirmed that options are within the justification stage.

> "The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan ... reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."

See also id. at 742 n.12 (In holding unconstitutional New Jersey's congressional reapportionment plan with disparities unrelated to the professed objective of preserving racial minority voting strength, the Supreme Court noted that at oral argument the State had suggested other considerations. After pointing out that those were not properly before it, the Supreme Court continued: "Furthermore,

several plans before the Legislature with significantly lower population deviations [enveloped those aims].").

Confusing alternatives with remedies, defendants disavow the formers' relevance. See e.g., Attorney's Aff. of Susan R. Rosenberg at 1 ("[A]ll this discussion is premature and ... inappropriate. The issue before the Court is not remedy, but the underlying merits.").

To the contrary, scrutinizing alternatives -- not remedies -- is undeniably appropriate at this point. See e.g., Kilgarlin v. Hill, 386 U.S. at 123-24 (quoted supra pp. 6-7); Travis v. King, 552 F. Supp. 554, 561-62 (D. Hawaii 1982) ("Assuming [Hawaii] could have drawn districts of equal populations ... -- and no evidence to the contrary was presented -- the maximum deviations ... would have been substantially reduced ... Based on this

substantial and wholly unjustified increase in total deviation, we find that the state plan, as it relates to the state house of representatives, fails to reasonably further the state's expressed policy and is thus unconstitutional.").

Plaintiffs recognize the reasonableness of examining other schemes, having all along suggested plans that incorporate the accepted aims while reducing the disproportion.[10] See Connor v. Finch, 431 U.S. 407, 420 (1977) (In rejecting a more strictly inspected court plan with a 16.5% deviation, the Supreme Court said that, "[P]laintiffs ... submitted ... an alternative [Mississippi] Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted, and [with a 13.66% variance] also came closer to achieving districts that are 'as nearly of equal

population as is practicable.' Reynolds v. Sims, [377 U.S.] at 577.").

As one example, plaintiffs point to a weighted voting system keeping the Board's form but reworking its ballot allocation to correlate with the markedly unequal borough populations. Developed by Professor Steven J. Brams, whose expertise was noted in Morris v. Board of Estimate, 592 F. Supp. at 1474, this option has 7.8% whole and 18.2% budget Board inequalities.

Professor Lee Papayanopoulos, who has been retained by over thirty county boards of supervisors to assign computer derived voting weights to representational plans, endorses Professor Brams' design, emphasizing that:

> "These very interests are ... of substantial concern to the participants in most of the schemes I have designed .... The towns which comprise New York counties each have their own history, boundaries, integrity, desire for a voice, need not to be dominated

> and desire to have effective county government .... [E]very town has an overriding concern that county government will respect its special needs and integrity.
>
> ... [T]his is accomplished ... by ... a weighted voting scheme. Weighted voting schemes parcel out voting power ... in a manner that guarantees each town its fair share, its voice on the critical votes. Because every town representative knows that he or she has a meaningful share of the critical votes, deference and collegiality develop which usually avoid close (critical) votes. But when critical votes do occur every town knows that its voice means something.

Aff. of Professor Lee Papayanopoulos at 3-4.

Cf. Franklin v. Krause, 344 N.Y.S.2d 885, 889 (1973), appeal dismissed, 415 U.S. 904 (1974) ("[T]o preserve unit boundary lines and the concomitant efficiency in the rendition of local services, without creating a monstrous legislative body, virtually necessitates a weighted voting system [for Nassau County's Board of Supervisors] which can approach as closely as possible

the one man, one vote principles ....") (emphasis in original).

Although rejecting the relevance of alternatives, defendants attempt some rebuttal. For instance, they maintain that weighted voting ignores the relationship between the at-large and borough contingents.

To explain, under Professor Brams' system, the city-wide members would have twenty votes apiece, in the aggregate sustaining their majority status. The borough delegates would be assigned votes by population, with the Staten Island representative at one end receiving three and the Brooklyn representative at the other receiving sixteen. Critical of such a distribution, city defendants question:

> "Does it really make sense that [the Brooklyn] borough president, representing 31.5% of the City's population, should have 80% of the voting power of the Mayor, Comptroller [or] City Council

President, all of whom have been elected by the City as a whole?

Attorney's Aff. of Susan R. Rosenberg at 2-3.

Adopting, for the moment, city defendants' perspective (i.e., in measuring the deviation, the at-large and borough votes should be collectively assessed), the answer is that it makes as little or as much sense as --- under the present plan --- allocating to the Staten Island Borough President 50% of a city-wide official's ballot strength when he represents roughly 5% of the metropolitan population. The question is nonsensical because it derives from a faulty formula for calibrating the Board's composite mode, and simply highlights the analytical pitfalls of gauging together the distinct delegate sets.

Professor Brams, consistent with his previous approved refusal to disperse the city-wide members' conjectured vote influence

among the boroughs, see Morris v. Board of Estimate, 592 F. Supp. at 1474 & n.15, again separates the two representational tiers to calculate the suggested plan's disparity. The court, as before, agrees with that methodological perspective and rejects city defendants' restated criticism.

Intervenor defendant Straniere and amicus Marchi chiefly protest that the smaller boroughs would have no say under Professor Brams' suggested weighted voting system. Professor Papayanopoulos, however, has met that complaint. See also Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 203 (S.D.N.Y.), aff'd, 742 F.2d 1434 (2d Cir. 1983). ("Adjusted weighted voting has been recognized as a means of overcoming malapportionment ... in local legislative bodies and to assure that sparsely populated areas ... have a voice in the councils of government."); Lijphart,

Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements at 150, in Representation and Redistricting Issues (B. Grofman ed. 1982) ("One of the main advantages of weighted voting is to give representation to small districts without violating equal per capita representation and without making the legislature too large ....").

Besides the weighted voting option, plaintiffs have suggested other alternatives, several founded on a proportional representation structure (each borough having delegates corresponding to population) coupled with three respective methods of electing those individuals (adjusted district voting, limited voting and successive approval voting).

It would appear that proportional representation would more closely honor the one person, one vote dictate. See Still, Political Equality and Election Systems, 91 Ethics 375, 384 (1981) ("[Theoretically, under that system,] each group ought to be represented in the same relative numbers as it would be if the entire electorate were to meet as a direct democracy.") Also, depending on the process employed, proportional representation would advance some accepted objectives, since (except for adjusted district voting) borough-wide representation would be retained.

Noting that a proportional representation system was brought up before in this suit, city defendants comment that it "received a negative reaction as expensive, cumbersome and essentially duplicative of the City Council." Attorney's Aff. of Susan R. Rosenberg at 2. The adverse response was

not unmerited as even plaintiffs admit, since Board membership would increase to at least nineteen, thereby negating "the legitimate interest in preserving the small size of a Board." Aff. of Richard Emery and Ex. in Support of Summary Judgment at 42 n.20.

Straniere mainly complains that with proportional representation the boroughs would be carved into districts (each approximately Staten Island's population) causing the City's "balkanization" and preventing the Board's ability to continue "as an efficient and effective governing body for this extremely diverse City." Aff. of Robert A. Straniere at 21-22. At least as to physical subdividing, Straniere is only partially correct. That would occur with adjusted district voting -- not with the other suggested procedures. More importantly, even that choice would appear preferable to the current plan with its enormous deviation.

Finally, plaintiffs have previously mentioned other possible designs. One such substitute, which might sufficiently promote the identified goals and comport with equal protection, is a borough residency requirement comparable to that cautiously allowed in Dusch v. Davis, 387 U.S. 112, 114-15 (1967).

Summarizing the furtherance issue, alternatives have been suggested that would "substantially vindicate" the accepted policies and interests "yet approximate population equality more closely." Karcher v. Daggett, 462 U.S. at 741. See also Connor v. Finch, 431 U.S. at 420. The existing plan with its much greater departure from franchise equality does not advance the valid policies and interests. See Mahan v. Howell, 410 U.S. at 328. Kilgarlin v. Hill, 386 U.S. at 123-24.

That being so, defendants have failed to carry their requisite justification burden. See Karcher v. Daggett, 462 U.S. at 741-42 & n.12; Travis v. King, 552 F. Supp. at 561-62. See also Cosnor v. Dalton, 552 F. Supp. 350, 358-59 (E.D. Va. 1981). Accordingly, since equal protection is transgressed by the unexcused malapportionment, the Board's voting plan under sections 61 and 62 of the New York City Charter is held to be unconstitutional.

II. Remedy

Based on the foregoing, the Board's voting plan must be recast. That is a legislative task, the judiciary's role being restricted to seeing that a constitutional plan is enacted in a timely manner. See Wise v. Lipscomb, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is ... appropriate ... to afford a reasonable

opportunity for the legislature to meet constitutional requirements by adopting a substitute measure .... The new legislative plan ... will then be the governing law unless it, too, is challenged and found to violate the Constitution.")

Consistent with its circumscribed role, the court underscores that, while the preceding justification discussion noted the availability of possible alternatives, by no means are they recommended for implementation. See e.g., Chapman v. Meier, 420 U.S. 1 25-26 (1975). ("Special Master Ostenson['s devised model] demonstrates that [certain asserted concerns do not] prevent[] attaining a significantly lower population variance. We do not imply that the Ostenson plan should be adopted by the District Court ... What we intend ... is to show that th[ose] factors ... cannot be viewed as ... persuasive when other, less

statistically offensive, plans already devised are feasible.") (emphasis added).

CONCLUSION

During this justification stage, defendants have proposed numerous policies and interests that are valid in relation to the Board. Plaintiffs, however, have presented alternative plans that appear to respond to the accepted objectives and decidedly decrease the variance; necessarily, the current legislative plan does not further those legitimate aims. Defendants, as a result, have not justified the Board's present ballot allocation with its large 132.9% deviation from the one person, one vote rule.

Therefore, the court grants plaintffs' motion for summary judgment and declares sections 61 and 62 of the New York City Charter violative of the equal protection clause of the fourteenth amendment to the

United States Constitution. To remedy that illegality, city defendants are enjoined to undertake curative measures with all deliberate speed, allowing for likely appeals. The Board, in the meantime, shall continue to perform its duties under the present plan.

SO ORDERED.

Dated: Brooklyn, New York
November 19, 1986

/s/ _____
U.S.D.J.

## FOOTNOTES

1. Received along with the parties' current submission was a request by Dr. John F. Banzhaf III to appear as an amicus curiae. Evidently, he has reviewed some of the litigation's latest documents but - oddly - not the 1984 decision settling the methodology and deviation issues. Correspondingly, Dr. Banzhaf's tender is largely directed at decided questions or manifests an analysis contrary to the law of the case. Therefore, given his after-the-fact orientation, Dr. Banzhaf's amicus offer must be declined. See 3A C.J.S. Amicus Curiae, § 3, at 423 (1973) ("[T]he court may ... refuse [an amicus curiae motion], according as it deems the proffered information timely and useful ....").

2. The parties' current submissions are not precisely reflective, but addressing the validity and furtherance issues was directed.

> "[The litigants are to list those contested] policies and interests which at least one defendant maintains are valid and are presently served by the Board."

Morris v. Board of Estimate, 592 F. Supp. at 1477 (emphasis added). The parties' papers, in any event, adequately cover these questions.

3. Unlisted Number 18 is Number 3 with "representation" replaced by "participation." In a quantitative reapportionment suit, such as this, see

Morris v. Board of Estimate, 592 F. Supp. at 1465-66, the two terms are really one, participation being a function of representation.

> "[R]epresentative government is in essence self-government through ... elected representatives ... and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."

Reynolds v. Sims, 377 U.S. at 565. Number 18, accordingly, is subsumed under Number 3.

4. Plaintiffs now acknowledge that, in the main, defendants' proposed aims are cognizable. At the same time, they stress that the 132.9% disproportion is unforgiven because optional plans, which foster the genuine objectives at lower variances, are available.

> "The heart of plaintiffs' response ... is that a Board with an equal vote for ... each borough is unnecessary to satisfy the interests .... ... Since none of the concededly valid interests requires the [present] voting

> dilution ..., no justification exists for deviating from one person, one vote strictures."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 32-33 (emphasis in original). While somewhat more resistant, Citizens Union does join plaintiffs for the most part. Regarding the remaining considerations, the court largely agrees with plaintiffs' revised view.

5. Amicus Citizens Union demurs, basically making two, objections. First they call into question the concept's nonspecificity. The dictionary meaning, however, is a serviceable enough yardstick. Second they challenge the Board's performance. See e.g., New York State Charter Revision Commission Report at 86 (1975) ("Some public criticism ... is directed at [Board] procedures alleged to be unresponsive, inconvenient or undemocratic.") But see Kramarsky Study at 20 ("Much ... criticism ... is directed at procedures .... More often that not, the real objection is to the decision of the Board rather than to the method of achieving it."). Despite accounting for such criticism, this fact remains: The Board has been generally commended for the very effectiveness that even plaintiffs early on admitted. See Morris v. Board of Estimate, 592 F. Supp. at 1476 n. 18, 1477 n.20.

6. As with the rejected police power consideration, effectiveness, at least on the surface, suffers some overbreadth. But the Board's competence has been attested to and - importantly -

contrasted with other civic bodies. See e.g., New York State Charter Revision Commission Report at 18 (1900); New York State Charter Revision Commission Report at 84 (1975). This goal, in short, has not been attained by all local governmental institutions. That narrowing distinction renders the Board's effectiveness an "explicit, precise" concern meriting validation. Karcher v. Daggett, 462 U.S. at 734 n.6.

7. The essence of the bracketed portion is contained in a weighted voting discussion immediately after the quoted sentence. See id. at 39. It should be stressed, though, that proportionality is certainly not mandated by the Constitution. See Davis v. Bandemer, 106 S. Ct. 2797, 2809 (1986) ("Our cases ... clearly foreclose any claim that the Constitution requires proportional representation ....").

8. Plaintiffs do not take-up in their policies and interests analysis section the Board supplementing the City Council, a consideration limited by the court to mean providing a forum for borough-wide representation. See infra pp. 33-34 & note 9. Plaintiffs do briefly address this objective before, acknowledging it as "no doubt true." Aff. of Richard Emery and Ex. in Support of Summary Judgment at 26. In not amplifying on the Board-City Council relationship, plaintiffs have failed as well to list the related concerns (Numbers 7 and 14). The Court has done so.

9. Intervenor defendant Straniere regards these two political bodies form another vantage point, the Board supplementing the City Council's powers. Given the Board's structure, that seems a minimizing misperception.

10. Plaintiffs, in fact, do not maintain that all their suggested alternatives advance all the credited aims. See discussion infra p. 40. Nor do plaintiffs have to. See Karcher v. Daggett, 462 U.S. at 741 (quoted supra p. 10).